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IT IS SO ORDERED.

Guy R. Humphrey
United States Bankruptcy Judge

Dated: September 02, 2008

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: JAMIE L. SCHENKER, *Debtor*	Case No. 04-36137 Adv. No. 08-3129
JAMIE L. SCHENKER, *Plaintiff* v. OCWEN LOAN SERVICING, *Defendant*	Judge Humphrey Chapter 13

Decision Granting in Part, and Denying in Part, Ocwen Loan Servicing, LLC's Motion to Dismiss and Granting Plaintiff's Motion to File an Amended Complaint

Background

On July 16, 2004, the Debtor, Jamie L. Schenker ("Plaintiff" or "Debtor"), filed a Chapter 13 petition and bankruptcy schedules (Estate Doc. 1). The Debtor filed a Chapter 13 Plan and proposed to pay Ocwen Loan Servicing LLC, as Trustee for U.S. Bank N.A. ("Ocwen"), $485 each month as the mortgage payment on the Debtor's primary residence and to cure a pre-petition arrearage of $4,850. Although Ocwen initially objected to the plan and moved to dismiss the Chapter 13 case (See Estate Docs. 10 and 11), these objections were withdrawn (Estate Docs. 17 and 18) and an amended plan (Estate Doc. 15) (the "Plan") was confirmed (Estate Doc. 25) that did not change the treatment of Ocwen's secured claim.

After confirmation of the Plan, the Debtor objected to Ocwen's proof of claim (6-1), arguing that $2,000 of its claim was for costs, attorney fees and force place insurance costs and should be disallowed (Estate Doc. 33). The parties entered into an agreed order on July 7, 2006 disallowing $1,683 in attorney fees included in Ocwen's proof of claim (Estate Doc. 37) (the "Agreed Order").

On May 1, 2008, the Debtor filed a seven count adversary proceeding against Ocwen (Doc. 1). Ocwen moved to dismiss counts 2 through 7 (Doc. 5). The Debtor responded to the partial dismissal motion (Doc. 8) and sought leave to amend the complaint (Doc. 9). For procedural reasons only, the motion for leave was denied, without prejudice (Doc. 10). The Debtor filed an amended motion to amend the complaint (Doc. 13). Ocwen filed a reply brief supporting its partial dismissal motion (Doc. 12) and objected to the Debtor's amended motion to file an amended complaint (Doc. 14).

The Allegations in the Debtor's Complaint and the Proposed Amended Complaint

The Plaintiff's complaint centers around her inability to refinance her mortgage and complete the Plan due to the asserted failure of Ocwen to provide information concerning her loan and allegations of Ocwen's misallocation of payments made to it by the Debtor. Specifically, the complaint alleges, when the Debtor attempted to obtain information on the payoff, Ocwen did not respond to a "Qualified Written Request" ("QWR") with such information (Doc. 1, ¶ 18).[1] Despite "countless hours on the phone and in correspondence", the Debtor has not received the information she needed (Doc. 1, ¶ 25). Additionally, the Debtor alleges payments were misapplied to attorney fees and force place insurance which should have been allocated to principal and interest (Doc. 1, ¶¶ 47-49).

The complaint has seven counts which can be summarized as follows: Count 1 concerns violations of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601-2617, in failing to timely provide responses to the QWR and correct the Debtor's mortgage account (Doc. 1, ¶¶ 38-43). Count 2 alleges that Ocwen, by misapplying plan payments that were to be allocated to principal and interest only, did not comply with 11 U.S.C. § 1326[2] (Doc. 1, ¶¶ 44-54). Specifically, Count 2 asserts that Ocwen applied payments in contravention of the Plan and requests this court to enforce the Plan pursuant to 11 U.S.C. § 105[3] and order "appropriate sanctions." (Doc 1, ¶¶ 45, 54). Count 3 raises a defamation claim (Doc. 1, ¶¶ 55-58). Count 4 alleges Ocwen committed the tort of

[1] A QWR is a written correspondence for information concerning a mortgage loan or a related escrow account. See 12 U.S.C. § 2605(e).

[2] 11 U.S.C. § 1326 addresses payments in a Chapter 13.

[3] 11 U.S.C. § 105, among other things, states that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

conversion by collecting fees and charges not owed and misapplying payments (Doc. 1, ¶¶ 59-61). Count 5 alleges that, by not providing the necessary information to allow the Debtor to refinance the mortgage and complete her payments under the Plan, Ocwen has been unjustly enriched by continuing to receive loan payments from her at a higher rate than she would be making to a third party (Doc. 1, ¶¶ 62-69). Count 6 alleges Ocwen committed negligence in failing to properly service the loan and in failing to maintain accurate records (Doc. 1, ¶¶ 70-72). Count 7 alleges Ocwen has committed the tort of intentional infliction of emotional distress ("IIED") (Doc. 1, ¶¶ 73-76). In its motion to dismiss, Ocwen seeks to dismiss Counts 2 though 7.

The Debtor's proposed amended complaint (Doc. 13, Exhibit M)[4] does not include Count 3 (Defamation) of the original complaint (Doc. 13, Exhibit M, strikeout of ¶¶ 62-65) and changes the factual underpinnings for some of the allegations in the other Counts. Count 2, based on 11 U.S.C. §§ 105 and 1326, would no longer allege that plan payments were to be allocated specifically to principal and interest, but it still asserts that Ocwen misallocated plan payments and that the arrearage asserted by Ocwen exceeds the amount provided for by the Plan and the Agreed Order (Doc. 13, Exhibit M, ¶¶ 44-61). The Conversion, Negligence, Unjust Enrichment and IIED Counts, except for being renumbered[5] and incorporating changes to other paragraphs of the complaint, are unchanged (Doc. 13, Exhibit M, ¶¶ 62-79).

[4] Exhibit M is a copy of the proposed amended complaint showing all changes from the original complaint.

[5] Any references to numbers corresponding to specific counts refer to the original complaint and not the proposed amended complaint.

The Parties' Arguments Concerning Partial Dismissal[6]

Ocwen argues Count 2 (relating to 11 U.S.C. § 1326) and Count 4 (Conversion) both should be dismissed because the complaint incorrectly alleges payments paid to Ocwen pursuant to the Plan were only to be devoted to principal and interest and this allegation is directly contradicted by the Agreed Order. Ocwen moves to dismiss Count 5 (Unjust Enrichment) because the Plaintiff incorrectly alleges a payoff quote was never provided to the Debtor and also because Count 5 incorrectly states the law by implying a duty under RESPA to provide a payoff quote. Ocwen seeks to dismiss Count 6 (Negligence) for the same reasons as Count 2 and 4, and also because, to the extent Count 6 concerns incorrect credit reporting, it is preempted by the Fair Credit Reporting Act. Finally, Ocwen argues Count 7 (Intentional Infliction of Emotional Distress) must be dismissed because the complaint's allegations, even if true, do not meet the legal standard for this tort under Ohio law.

The Debtor argues that, although she did receive a payoff quote in May 2007, the quote was inaccurate and added improper charges not justified by the Plan or the Agreed Order. The Debtor notes that the Agreed Order only addressed pre-petition arrearages and the issue in the Debtor's complaint concerns improper post-petition arrearage charges and misallocation of payments. The Debtor further argues that Count 2 (relating to 11 U.S.C. § 1326) and Count 4 (Conversion) are based on these alleged post-petition anomalies.

[6] The Debtor states, in a response brief to the motion to dismiss (Doc. 8, p. 3-4), that her RESPA claim (Count 1) is deemed admitted because the Defendant did not respond to Count 1 through an answer or otherwise, and instead moved to dismiss Counts 2 – 7. However, the court agrees with the majority position in the federal courts that a Rule 12(b) motion enlarges the time to file an answer until after a Rule 12(b) motion is ruled upon by the court, including claims not addressed in the 12(b) motion. *Ideal Instruments v. Rivard Instruments, Inc.*, 434 F.Supp.2d 598, 637-40 (N.D. Iowa 2006). See also Josh Belinfante, *To Answer or not to Answer: The Partial Motion to Dismiss*, 52-DEC Fed. Law. 20 (November/December 2005).

Concerning Count 5 (Unjust Enrichment), the Debtor asserts the issue is not a payoff quote, but rather the misallocation of payments and failure to provide a payment history. The Debtor asserts that due to these alleged commissions or omissions by Ocwen, the Debtor cannot refinance her mortgage or complete her Plan and continues to pay Ocwen under less favorable terms than her refinancing would have provided. Finally, the Debtor asserts that Count 6 (Negligence) is not related to improper credit reporting and, like some of the other Counts, is based on the post-petition misapplication of payments and failure to provide a detailed and accurate payment history.

The parties agree Count 3 (Defamation) should be dismissed.

Jurisdiction

This court has subject matter jurisdiction to decide the legal issues presented in this adversary proceeding. *McDaniel v. ABN Amro Mtge. Corp.*, 364 B.R. 644, 648 (S.D. Ohio 2007).

Motion to Dismiss Standard

Federal Rule of Civil Procedure 12(b)(6) states that a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." The Sixth Circuit has stated that "[d]ismissal of a complaint for the failure to state a claim on which relief may be granted is appropriate only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Thomas v. Eby,* 481 F.3d 434, 437 (6th Cir. 2007) (citation omitted). To survive a defendant's motion, the plaintiff's complaint "must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Varljen v. Cleveland Gear Co., Inc.,* 250 F.3d 426, 429 (6th Cir. 2001) (citations and internal quotation marks omitted).

In considering a motion to dismiss, the court "must consider as true the well-pleaded allegations of the complaint and construe them in the light most favorable to the plaintiff." *Id.* However, the court "need not accept as true legal conclusions or unwarranted factual inferences" in the complaint. *Id.* (citations omitted). The Supreme Court has recently reminded the federal courts that while a plaintiff need not provide detailed factual allegations to survive a motion to dismiss pursuant to Rule 12(b)(6), "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 1964-65 (2007) (citations omitted).[7]

Analysis

Count 3 (Defamation)

The parties agree that the defamation claim should be dismissed as a matter of law and, therefore, the defamation claim is **dismissed**.

Count 2 (11 U.S.C. § 1326), Count 4 (Conversion), Count 5 (Unjust Enrichment), and Count 6 (Negligence)

In reviewing the Debtor's complaint, the Unjust Enrichment, Negligence, Conversion, and 11 U.S.C. § 1326 Counts are all based on the common factual allegations that payments were misapplied, improper arrearages were included in Ocwen's proof of claim, and a proper payment history and an accurate payoff quote have not been provided. All of these allegations concern the post-petition actions of Ocwen and assert allegations that can withstand a Rule 12(b)(6) motion to dismiss. Any factual errors in the Debtor's complaint

[7] Due to another Supreme Court Decision decided two weeks after *Twombly*, *Erickson v. Pardus*, __ U.S. __, 127 S.Ct. 2197 (2007), the amount of specificity required in factual allegations in a complaint remains unsettled in the Sixth Circuit. *United States v. Ford Motor Co.*, 532 F.3d 496, 502, n.6 (2008).

can be cured by the proposed amended complaint. Accordingly, even if the Debtor erroneously asserted in her complaint all payments paid to Ocwen pursuant to the Plan were to be applied to principal and interest, and did not reference the Agreed Order, or stated a payoff quote was never provided, these factual errors are not sufficient to dismiss the Unjust Enrichment, Negligence, Conversion or 11 U.S.C. § 1326 Counts (Counts 2, 4, 5, and 6). The allegations of the Debtor's complaint and proposed amended complaint are, in essence, the same: Ocwen made a series of post-petition errors which deprived the Debtor of the ability to refinance her mortgage and complete the Plan. As will be discussed below, and as a corollary to this legal ruling, Rule 15 of the Federal Rules of Civil Procedure provides ample authority to amend the complaint at this early stage.[8]

In sum, in reviewing the Debtor's complaint, and based on the standards applicable to the consideration of a motion under Federal Rule of Civil Procedure 12(b)(6), the portion of the motion seeking to dismiss the Unjust Enrichment, Negligence, Conversion and 11 U.S.C. § 1326 Counts (Counts 2, 4, 5, and 6) is **denied**.

Count 7
(Intentional Infliction of Emotional Distress)

Ocwen argues that the Debtor's claim for intentional infliction of emotional distress (Count 7) fails as a matter of law. The Debtor alleges that "[t]he actions and inactions of the Defendant as set forth herein are so disingenuous as to rise to the level of actual malice toward the Plaintiff and have caused her immeasurable suffering and stress in the form of

[8] Ocwen argues that the Debtor's negligence claim is preempted to the extent it is based on the Fair Credit Reporting Act. The Debtor responds that the claim does not concern credit reporting, but rather negligence in servicing these loans and in failing to keep accurate records. The court agrees that the complaint provides Ocwen with fair notice of the allegations as to Ocwen's negligence and is not a claim for injury to her credit due to improper credit reporting by Ocwen (See Doc. 1, ¶¶ 70-72).

constant worry, loss of sleep, actual illness and exacerbations of previous medical conditions." (Doc. 1, ¶ 74). The complaint also alleges that "[t]he stress caused by the Defendant was enhanced by the trauma of having The Property publicly announced as in foreclosure and the embarrassment of being served notice of foreclosure in their neighborhood surroundings." (Doc. 1, ¶ 75). The fact section of the complaint, incorporated into this Count, alleges "severe stress, lost time, mental anguish and suffering, emotional distress, embarrassment, humiliation, and damages to her credit standing and reputation" and that the Debtor had sought "medical attention" due to "physical reactions" from the stress of addressing her "mortgage loan problems." (Doc. 1, ¶¶ 32-33).

Ohio recognizes intentional infliction of emotional distress as an independent tort. *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Amer.*, 453 N.E.2d 666, 670 (Ohio 1983), *reversed on other grounds by Welling v. Weinfield*, 866 N.E.2d 1051 (Ohio 2007). The Supreme Court of Ohio adopted the standard from Restatement of the Law 2d, Torts (1965) 71, Section 46(1), which states "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Id.* at 671. In further illuminating this standard, the court stated:

> With respect to the requirement that the conduct alleged be "extreme and outrageous," we find comment *d* to Section 46 of the Restatement, *supra,* at 73, to be instructive in describing this standard:
>
> " * * * It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all

> possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'
>
> "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. See Magruder, Mental and Emotional Disturbance in the Law of Torts, [49] Harvard Law Review 1033, 1053 (1936). *** * *** "

Id. at 671 – 72. Although the court recognizes the standard under Ohio law for intentional infliction of emotional distress is a particularly strict and exacting one, the court cannot find, under the facts alleged in the initial pleading stage of this litigation, it is "beyond a doubt" that the Debtor cannot sustain this cause of action as a matter of law. *Eby*, 481 F.3d at 437. In *MacDermid v. Discover Fin. Svcs.*, 488 F.3d 721, 731-32 (6th Cir. 2007), a case involving debt collection, the court found that dismissal of an IIED claim could not be granted at the Rule 12 stage of the litigation. While the court recognizes that the factual allegations in *MacDermid* were more specific, this court determines that the Debtor's complaint sufficiently alleges an IIED claim and cannot be dismissed at the initial pleading stage. Accordingly, the portion of Ocwen's motion seeking to dismiss the intentional infliction of emotional distress cause of action (Count 7) is **denied**.

The Plaintiff's Motion to Amend the Complaint

As described earlier, the Debtor seeks to amend her complaint to: a) change certain factual allegations, b) eliminate the Defamation Count (Count 3), and c) amend the 11 U.S.C.

§ 1326 Count (Count 2) (See Doc. 13, Exhibit M). Federal Rule of Civil Procedure 15(a)(2), applicable to this adversary proceeding through Bankruptcy Rule 7015, addresses the standard for granting leave for a party to file amendments to pleadings after a responsive pleading has been filed. Rule 15(a)(2) states that "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." "Factors that may affect that determination include undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendment, undue prejudice to the opposing party, and futility of the amendment." *Comm. Money Center, Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 346 (6th Cir. 2007).

In this instance, none of the factors set forth by the Sixth Circuit apply. The amendment is at the early stages of this litigation, no bad faith has been alleged by Ocwen, the complaint has not previously been amended, and no undue prejudice to Ocwen has been asserted. Finally, the amended complaint, as explained above, is not futile.

Accordingly, the Debtor's motion for leave to amend her complaint (Doc. 13) is **granted**.[9] The Plaintiff shall file her amended complaint not later than 15 days after the issuance of the order memorializing this decision and any responsive pleading shall be filed within the limits of Federal Rule of Civil Procedure 15(a)(3).

[9] Ocwen appears concerned about duplicative complaints. To clarify any question on this issue, the court notes the Debtor's amended complaint, once filed, shall contain all of the Debtor's factual allegations, remaining Counts, and prayers for relief and shall supersede and replace the original complaint. See generally *Owens v. Republic of Sudan*, 412 F.Supp.2d 99, 117 (D.D.C. 2006). Ocwen need not file any further responsive pleading as to the original complaint (Doc. 1), but will need to answer or otherwise respond to Plaintiff's amended complaint once it is filed.

Conclusion

The Plaintiff's motion to amend her complaint (Doc. 13) is **granted**. Ocwen's motion to dismiss (Doc. 5) is **denied**, with the exception that the section of the motion seeking to dismiss the defamation claim is **granted**. The court will issue a separate order consistent with this decision.

c:

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